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 7 **UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF CALIFORNIA
 8 **FRESNO DIVISION**

9	NATURAL RESOURCES DEFENSE)	
10	COUNCIL, et al.,)	Case No.: 05-CV-01207 (OWW) (LJO)
)	
11	Plaintiffs,)	
)	
12	v.)	Federal Defendants’ Memorandum in
)	Support of Motion for Extension of Time
13	DIRK KEMPTHORNE et al.,)	or, in the Alternative, for Relief from
)	Court’s Order under Fed. R. Civ. P. 60(b)
14	Defendants.)	
)	
15	SAN LUIS & DELTA MENDOTA)	Hearing: August 29, 2008
	WATER AUTHORITY, et. al.)	Time: 9:00 a.m.
)	Courtroom: 3
16	Defendant-Intervenors)	Judge: Hon. Oliver W. Wanger
17	_____)	

18 The Court’s interim remedial order in this matter remanded the biological opinion on the
 19 “Operations Criteria and Plan” (“OCAP”) for the coordinated operation of the Central Valley
 20 Project (“CVP”) and State Water Project (“SWP”) to the United States Fish and Wildlife Service
 21 (the “Service,” “FWS”) “for further consideration consistent with [the] Court’s orders and the
 22 requirements of law.” Interim Remedial Order Following Summary Judgment and Evidentiary
 23 Hearing, Docket No. 560 (Dec. 14, 2007), ¶ I.A.1. The order requires this remand to be
 24 completed by September 15, 2008, “at which time FWS shall issue a new Biological Opinion . . .
 25 on the effects of the operation of the CVP and SWP upon the Delta smelt.” *Id.* at ¶ I.A.1. For
 26 the reasons discussed below, the Federal Defendants no longer believe that it will be possible to
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1 complete this biological opinion by September 15, 2008. As such, the Federal Defendants now
2 move this Court for an extension of this deadline until **December 15, 2008** (or, in the alternative,
3 for relief from the Court’s order under Fed. R. Civ. P. 60(b)). Fed. R. Civ. P. 60(b) provides
4 that, “[o]n motion and just terms,” the Court “may relieve a party . . . from a final judgment,
5 order, or proceeding” for reasons including “newly discovered evidence” or “any other reason
6 that justifies relief.” Fed. R. Civ. P. 60(b)(2), (6).
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8 The Service has been working diligently with the Bureau of Reclamation
9 (“Reclamation”) and the State of California’s Department of Water Resources (“DWR”) to
10 develop this biological opinion, but both the proposed coordinated operations and the scientific
11 issues raised here are extraordinarily complex. Reclamation sent its “biological assessment”
12 (“BA”) of the effects of these operations to the Service on May 16, 2008. Declaration of Cay
13 Collette Goude (“Goude Decl.”) (July 17, 2008) (attached hereto as Exhibit 1), ¶ 2. That
14 biological assessment – even without its 22 appendices – is already over 1,000 pages long.
15 Goude Decl. ¶ 6.

16 Consultation necessarily (and properly) involves “back and forth” between the action
17 agency and the consulting agency and, after certain revisions and addenda were completed, the
18 Service began its formal review of this extensive BA on May 28, 2008. *Id.* ¶ 2. Endangered
19 Species Act (“ESA”) regulations give the Service 30 days to review a BA. 50 C.F.R. § 402.12(j)
20 (stating that “[t]he [Fish and Wildlife Service Regional] Director will respond in writing within
21 30 days as to whether or not he concurs with the findings of the biological assessment.”). On
22 June 27, 2008, the Service completed its review and sent a letter to Reclamation (with a copy to
23 DWR in their capacity as an applicant) asking for further explanation of certain issues and for
24 additional modeling of certain scenarios. Goude Decl. ¶ 3; *see also* Letter from Cay C. Goude,
25 U.S. Fish and Wildlife Service, to Operations Manager, Bureau of Reclamation (June 27, 2008)
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1 (attached as Exhibit 2 to the Goude Decl.). More specifically, the Service asked Reclamation to
2 produce modeling runs based on different boundary conditions; to augment its descriptions of
3 certain project elements (such as the proposed intertie between the California Aqueduct and the
4 Delta-Mendota Canal); and to analyze additional information on climate change. Goude Decl. ¶
5 4.

6 Reclamation intends to provide this additional information and modeling regarding the
7 Central Valley Project, and to assist DWR in providing the information that the Service has
8 requested regarding the State Water Project, to the Service by August 1, 2008. Declaration of
9 Ronald Milligan (“Milligan Decl.”) (July 17, 2008) (attached hereto as Exhibit 2), ¶¶ 5-6; *see*
10 *also* Goude Decl. ¶ 5. Once the Service has everything that it needs, writing this biological
11 opinion will take all of the time available under the ESA and its regulations because it will be
12 based on “one of the most complex biological assessment[s] ever provided by an action agency
13 in the history of the ESA.” Goude Decl. ¶ 6. The Service will also be required to analyze a
14 significant amount of sophisticated modeling. *Id.* And, of course, the Service must also review
15 all of the “best scientific and commercial data available,” 16 U.S.C. § 1536(a)(2), including the
16 data already in its files, information available from public sources (such as the Interagency
17 Ecological Program), and recent scientific studies including Dr. Wim Kimmerer’s study of the
18 effects of the export facilities on delta smelt and salmon (which was the subject of extended
19 testimony during the recent evidentiary hearing in the companion case, *Pacific Coast Federation*
20 *of Fishermen’s Associations v. Gutierrez*, No. 06-cv-645 (E.D. Cal.)). *See* Goude Decl. ¶ 7.
21 This will include data on the current status of the Delta smelt and conditions in the Central
22 Valley, including factors that may lead to the “uplisting” of the species as “endangered.”
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25 Due to the time that it has taken to compile, review, and supplement the BA in this
26 matter, as well as the extensive resources that both the Service and Reclamation have committed
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1 to the support of this litigation (and, for Reclamation, the litigation of the companion case), there
2 is not enough time between now and September 15, 2008 to complete a biological opinion that
3 will withstand judicial review. *See* Goude Decl. ¶ 8. By extending that deadline to December
4 15, 2008, the Court will give the Service about 135 days to complete its biological opinion (from
5 the completion and review of the BA), which is the full amount of time allowed by the ESA. 16
6 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e) (allowing 90 days for formal consultation and then
7 45 additional days to write the biological opinion). That time is necessary to give the Service the
8 opportunity to write a thorough and complete biological opinion. *Id.* ¶ 9.

10 In addition, this extension will also allow the Service to coordinate its biological opinion
11 to a greater degree with NMFS. Goude Decl. ¶ 9. As the Court is aware, NMFS is currently
12 working to complete its own biological opinion by March 2, 2009. Under that schedule, NMFS
13 plans to prepare a draft biological opinion by early December 2008. Goude Decl. ¶ 9. If the
14 Court's deadline for the Service's biological opinion is extended until December 15, 2008, the
15 Service will be better able to coordinate with NMFS because it will have reviewed a draft of
16 NMFS' biological opinion. *Id.* That greater degree of coordination will help the Services to
17 "minimize the potential for reasonable and prudent alternatives, reasonable and prudent
18 measures, or conservation measures made in one agency's biological opinion to result in adverse
19 effects upon the species covered in the other agency's biological opinion." *Id.*

21 The Service needs enough time to ensure that this biological opinion is scientifically
22 sound and legally defensible. *See United Steelworkers v. Rubber Mfrs. Ass'n*, 783 F.2d 1117,
23 1120 (D.C. Cir. 1986) (judicial imposition of an overly hasty timetable is not advisable because
24 an agency's ultimate decision "must be constructed carefully and thoroughly if the agency's
25 action is to pass judicial scrutiny"). Neither the ESA nor any provision of administrative law
26 requires the Service to complete this remand on a specific timetable, so the Service should retain
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1 the discretion to determine how it “may best proceed to develop the needed evidence and how its
2 prior decision should be modified in light of such evidence as develops.” *Federal Power*
3 *Comm’n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333-34 (1976). Requiring the
4 Service to adhere to the current schedule would ignore these factors and sacrifice substance for a
5 short-term expediency that would not ultimately serve the interests of the Court, the parties, or
6 the Delta smelt. *See Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (noting that the
7 agency “must be afforded the amount of time necessary to analyze such questions so that it can
8 reach considered results in a final rulemaking that will not be arbitrary and capricious or an
9 abuse of discretion”). Indeed, “by decreasing the risk of later judicial invalidation and remand to
10 the agency, additional time spent” preparing this biological opinion “may well ensure earlier, not
11 later, implementation” of its terms. *See id.* at 798-99; *see also Sierra Club v. Thomas*, 658 F.
12 Supp. 165, 175 (N.D. Cal. 1987) (“[S]ince the purpose of this order is to protect the public
13 interest and not to punish EPA, the Court would extend EPA’s time . . . if it were convinced that
14 doing so was necessary for the promulgation of workable regulations”). Here, holding the
15 Service to the current deadline of September 15, 2008 would only be likely to result in another
16 cycle of remand, interim remedies, and judicial review that would ultimately delay the
17 completion of an adequate biological opinion and tax the resources of the Court, the agencies,
18 and the parties.

21 To the extent that any of the terms of the Court’s interim remedies order apply during the
22 period from September 15, 2008 to December 15, 2008, they would remain in effect. This
23 motion has been brought within one year of the Court’s remand order, and thus is timely under
24 the terms of Fed. R. Civ. P. 60(c)(1) (to the extent that this deadline applies to the Court’s
25 interim remedy order). The events that have transpired in the consultation since the Court issued
26 its order constitute “newly discovered evidence” for the purposes of Rule 60(b).

1 For all of the reasons set out above, this motion should be granted, and the deadline for
2 the completion of this remand should be extended to December 15, 2008.

3 Respectfully submitted this 29th day of July, 2008,

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